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Judgment: approved by the Court for handing down | *Delivered:* **30/06/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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v

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Before: Morgan LCJ, Deeny J and Treacy J

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TREACY J (delivering the Judgment of the Court)

Reporting Restrictions

[1] As this is an application relating to a sexual offence automatic reporting restrictions apply in respect of protecting the identity of the victim. In view of the complainant's right to anonymity she shall be referred to throughout this judgment as V.

Introduction

[2] At trial Mr Johnston represented the appellant. On the appeal Mr Lyttle QC appeared with Mr Johnston for the appellant. Ms Brady appeared on behalf of the Crown. The Court is grateful to Counsel for their focussed written and oral submissions.

[3] On 7 June 2013 the appellant was arraigned and pleaded guilty to Counts 2-4 (Common Assault, Criminal Damage and Possession of a Class B Drug respectively) and pleaded not guilty to Count 1 (Sexual Assault by Penetration). Almost 10 months later on 7 March 2014 the appellant was

re-arraigned and pleaded guilty to Count 1. This was one week before his trial before Her Honour Judge Philpott at Belfast Crown Court.

[4] On 11 April 2014 the appellant was sentenced to a determinate custodial sentence of 3 years' imprisonment (18 months' imprisonment and 18 months' licence period) in respect of count 1; on count 2 (S47 OAPA Common Assault), DCS 1 year imprisonment (6 months' imprisonment and 6 months' licence) (concurrent with Count 1); on count 3 (criminal damage), 6 months' imprisonment (concurrent with Count 1) and on count 4 (possession of Class B drug) 3 months' imprisonment (concurrent with Count 1).

[5] The appellant appealed with leave of the Single Judge against a total effective sentence of 18 months imprisonment followed by 18 months on licence.

Factual Background

[6] V and the appellant had been in a relationship for two years that had broken down four months previously. On the day of the incident the appellant entered V's home where a male guest had stayed overnight. After the other male left the appellant attacked V forcing a finger or fingers into her vagina against her will and running his finger across her upper lip. He maintained his motivation was to check if she had had intercourse with the other male. This behaviour was represented by Count 1 on the indictment.

[7] The appellant went on to commit a further violent assault on V in the course of which he smashed her phone, grabbed her hair, pulled her to the ground and called her names such as 'slut', 'slag' and 'whore'. She escaped via the back door, fled to a neighbour's house and asked for the police to be called. She returned when the appellant threatened to trash her house. He then hit her across the face and spat in her face. The appellant was still in the house when police arrived.

[8] In her statement to police V stated:

> "... [The appellant] came out of the kitchen and grabbed me by my dressing gown with both hands as I stood in the hall and asked 'Have you been shagging him?' He then told me that

> I had been doing this for ages behind his back and that I have been accusing him of doing it for years when all along it's been me. [He] was right up in my face still grabbing my dressing gown and was gritting his teeth. At this point he put one of his hands down the front of my pyjama bottoms and entered his fingers into my vagina. I do not know how many fingers penetrated but I know it was more than one and they went the whole way in. As he did this he told me he would see how wet I was to see if I had been sleeping with M…. I started to cry and told him to get off me and pushed my hands against his body to get him off me and told him that I was going to ring Police. He pulled his hand out of my pyjama bottoms and rubbed his fingers on the upper lip of my face and did not say anything as he did this. [His] fingers had been inside my vagina for a couple of seconds before he did this. He then ran upstairs and said that he was going to check the bed sheets. He was upstairs for less than 1 minute before he came back downstairs with my mobile phone in his hand. This had been on my bedside table on the left hand side of my bed. He then went into my living room and lifted the wireless house phone off its cradle and smashed this off the right hand wall when you walk into the living room which left a mark on the wall. This is the only house phone that I have and [he] knows this …. [He] then grabbed me and pinned me against the patio doors in the living room and grabbed my face with his hands … He then grabbed my hair and pulled me down to the ground … and called me names such as slut, slag and whore. ..."

[9] In her sentencing remarks the Trial Judge referred to the sentence for the offence of sexual assault by penetration stating:

> "[14] This was a very nasty although short-lived unpleasant sexual incident. If you had not pleaded guilty in respect of that you would have received a sentence of three years. But on top of that you have committed what I regard as a nasty assault of the IP in addition to the sexual assault in the course of which you smashed her phone.
>
> [15] I am going to give a global sentence for this because I do not think it is appropriate to divide it up because it is part and parcel of all the same behaviour, but the physical assault afterwards and the smashing of the phone is an aggravating feature. I am sentencing you in total to three years. That is 18 months in custody and 18 months on Probation. "

Grounds of Appeal

[10] The complainant submitted that the total sentence of 3 years imprisonment was manifestly excessive and wrong in principle on the following summarised grounds:

(i) The Trial Judge's finding that the appropriate sentence after trial on Count 1 was 3 years imprisonment is out of keeping with R v Foronda [2014] NICA 17 (suggests 2 years imprisonment after trial) and the Sentencing Council's Definitive Guideline for the Sexual Offences Act 2003 (also suggests a starting point of 2 years imprisonment after trial).

(ii) By wrongly concluding that Count 1 carried a 3 year sentence after trial the Trial Judge started at too high a figure of imprisonment when determining the appropriate sentence for count 1 on a guilty plea and also played a part in the Trial Judge wrongly concluding that a global sentence of 3 years imprisonment was appropriate.

(iii) The Trial Judge's justification for a global sentence of 3 years imprisonment was that this was effectively 2 years imprisonment on count 1 and count 2 merited an additional 1 year

imprisonment. In doing so the Trial Judge erred for the following reasons:

(a) The imposition of effectively a consecutive sentence of 1 year imprisonment was wrong in principle as a concurrent sentence was more appropriate in the circumstances.

(b) The global sentence was manifestly excessive.

(c) The global sentence was out of keeping with sentencing authorities for count 2.

(d) There was failure to give adequate weight to the applicant's guilty plea to count 2 at arraignment and his admission of same in police interview.

(e) There was failure to give adequate weight to the fact count 2 carried a maximum sentence of 2 years imprisonment.

(iv) The manner in which the Trial Judge calculated the global sentence led to the imposition of a global sentence that was manifestly excessive.

(v) The Trial Judge failed to give sufficient weight to the totality principle when imposing a global sentence of 3 years imprisonment.

Discussion

[11] It is common case that the Judge's thinking was that had the appellant been sentenced for the sexual assault by penetration alone that the sentence would have been 2 years but the violent physical assault merited an increase in the 2 years to a 3 year sentence. It is clear from AG's Reference (No.6) Niall McGonigle [2007] NICA 16 at paras [24]-[27] that whether sentences are concurrent or consecutive the over-riding and important consideration is that the total global sentence should be just and proportionate.

[12] The basic contention of the appellant is that the global sentence was manifestly excessive. In support of that proposition the appellant submitted that the Trial Judge's findings that the appropriate sentence after

trial on Count 1 was 3 years was out of keeping with cases such as R v Foronda [2014] NICA 17 which, it was argued, suggested 2 years imprisonment after trial and the Sentencing Guidelines Council's "Definitive Guideline for the Sexual Offences Act 2003" which it was contended suggest a starting point of 2 years' imprisonment after trial. Although Foronda was an appeal against conviction only and the judgment does not contain any sentencing guidance in relation to the offence of sexual assault by penetration the starting point is consistent with other cases in this jurisdiction. The facts of this case are, however, materially different involving none of the aggravating features of the present case which we identify later in this judgment. For example there was no evidence of any gratuitous violence, additional degradation and humiliation, psychological harm nor any attempts to prevent the victim from reporting the incident or obtaining assistance. Had such features been present it seems inevitable that a materially longer sentence of imprisonment would have resulted. Evidence of gratuitous violence, additional degradation or humiliation will lead to a significant upward shift in the starting point in sexual offences generally. In R v Warnock [2013] NICA 34 an adult offender was sentenced after conviction to a four and a half year sentence (three years in custody and 18 months on probation) for three offences of indecent assault and one attempted indecent assault comprising the digital penetration of a female child. In R v JW [2013] NICA 6 an offender was sentenced to 18 months' imprisonment after trial for a single incident of digital penetration of a female child.

[13] The appellant had relied on the 2007 Sentencing Guidelines Council's Definitive Guideline for the Sexual Offences Act 2003 submitting that the facts on Count 1 were absent any of the specific aggravating features referred to by the Sentencing Guidelines Council.

[14] However, there is now a new Definitive Guideline on Sexual Offences which came into effect on 1 April 2014 which applies in England and Wales to all offenders aged 18 and older who are sentenced on or after 1 April 2014 ("the 2014 guidelines"). This applicant was sentenced on 11 April 2014. The Appellant contended that the present case falls within category 3 harm and category B culpability with the effect of generating a starting point under these guidelines of 2 years. Subject to what the court says below about the standing of these guidelines in Northern Ireland we merely observe that this submission is difficult to reconcile with the clear terms of the guidelines. Under the guidelines the first step is to determine

the offence category by determining which categories of harm and culpability the offence falls into by reference *only* to the "*tables*" provided. If any one of the factors set out under category 2 table is present it is so categorised under the guidelines. It is clear that V was subjected to violence beyond that which was inherent in the offence which is one of the factors that would bring it within category 2. We accept that the case in terms of culpability would be categorised as category B. The net effect of this is that, contrary to the case being advanced by the Appellant, the starting point *under the guidelines* is not 2 years but 6 years (with a category range of 4 - 9 years custody).

[15] Para B3.45 of Blackstone's Criminal Practice 2015 refers to sentencing in respect of the offence of assault by penetration and comments on the 2014 Sentencing Guidelines on Sexual Offences as follows:

> "The maximum penalty for assault by penetration is life imprisonment (SOA 2003, s2(4)). The Sentencing Council has issued a new definitive guideline applicable to sex offenders aged 18 or over who are sentenced on or after 1 April 2014 (see B3.3). The guideline (see Supplement SG-63) reflects the fact that the types of penetration that may be involved in assault by penetration are wider than in relation to rape and range from acts as severe as the highest category rape (for example, a violent sexual attack involving penetration of the victim with an object likely or intended to cause significant injury to the victim) to an activity that, whilst involving severe violation of the victim, is more akin to a serious sex assault (e.g. momentary penetration with fingers). Under the previous guideline a lower sentence would be given for penetration with a body part such as a finger or a tongue where no physical harm was sustained; a higher sentence would be given for penetration with an object (the larger or more dangerous object, the higher the sentence would be) or penetration combined with

abduction, detention, abuse of trust or more than one offender acting together.

The Council agreed with the conclusions of public research that, generally, where penetration of the genitals has occurred, the public felt that this was akin to rape regardless of what had been used to penetrate due to the inherent level of violation. The Council therefore adopted the approach that such assaults should generally be treated in very similar terms to rape in terms of harm caused with only two differences in the harm factors specified in the guidelines in relation to the two offences …..

The new guideline adopts a similar model as in rape in that it recognises that all examples of this offence are extremely harmful to the victim by assuming there is *always* a baseline of harm. This is reflected in offence category 3, which covers offences in which harm factors identified in category 2 are not present. The extreme nature of one or more category 2 factors or the extreme impact caused by a combination of category 2 factors may elevate the case to category 1. Having identified the offence category, the court should then determine whether any culpability A factors are present in order to ascertain the starting point. There is an assumed baseline of culpability reflected in category B.

The starting points and sentence ranges are the same as for rape, representing an increase from the levels recommended in the previous guideline. In respect of categories 2 and 3, sentencing levels are lower than for rape, but there is a discernible upwards shift. In a case involving the lowest level of harm (category 3) and lower culpability (category A), where there is sufficient prospect of rehabilitation, a

> community order with a sex offender treatment programme requirement can be a proper alternative to a short or moderate length custodial sentence.
>
> The offence is a qualifying offence for an automatic life sentence under the CJA 2003, sch.15B (see B3.15 and E4).
>
> In every case the court should consider a disqualification from working with children (see E21.17 and E21.21) and a sexual offences prevention order (see E21.24). There is a notification requirement under the SOA 2003, s80 and sch.3 (see E23)."

[16] Paras [19]-[24] of the recent Court of Appeal case of R v McCaughey & Smyth [2014] NICA 61 considered the applicability of the Sentencing Council's Guidelines in this jurisdiction. In particular, paras [22]-[23] refer to the approach to be taken in Northern Ireland. In essence, the Court of Appeal recognised the assistance to be derived from the aggravating and mitigating features identified by the Sentencing Council in its guidance but discouraged judges and practitioners from being constrained by the brackets of sentencing set out within the guidance. In particular, para [24] of the judgment specifically clarifies that such an approach also applies in respect of sexual offences:

> "[24] Despite this clear statement of principle we note that the submissions in the court below and in this court have sought to place considerable emphasis on the bracket into which these cases fall. We have also noted in other appeals that there has been some tendency to interpret the remarks of this court at paragraph 16 of R v SG [2010] NICA 32 that assistance may be derived from the final report of the Sentencing Guidelines Council as somehow indicating a different approach in sexual offences. We wish to make it clear that the approach set out at paragraphs 22 and 23 above applies in those cases also."

[17] Sexual assault by penetration carries a maximum penalty of life imprisonment. In the present case it involved a major violation of the victim's sexual autonomy and was aggravated by a number of features including that the offence was committed in V's home. As the Trial Judge pointed out this is an aggravating feature because the person has to remain living in that house.

[18] Count 1 was by far the most serious offence and as the trial judge recognised at para 18 of her remarks the sexual offence was done to degrade V. The appellant only pleaded guilty one week before trial. In AG's Reference (No 1 of 2006) [2006] NICA 4 at para 19 the Court said that to benefit from the maximum discount on the penalty appropriate to any specific charge a defendant must have admitted his guilt of that charge at the earliest opportunity. Counsel for the appellant have very properly accepted that he is not entitled to full credit for his late plea on Count 1. They did lay emphasis on the consideration that the appellant never disputed that he had penetrated the victim digitally. Somewhat unrealistically he was however contending that the assault was not a sexual assault. Thus it was submitted that there would have been no need for the victim to give evidence. Substantial credit is given to offenders who accept their guilt at the first opportunity. That credit diminishes the longer the defendant unjustifiably maintains a not guilty stance. Particularly in sex cases an early plea is of considerable value because it relieves the victim of the fear, stress and trauma of having to relive painful moments in a public court. The victim in this case was not informed prior to the appellant's change of plea in March 2014 that she would not require to give evidence. The prosecution correctly took the view that until he pleaded guilty the victim would be required to give evidence since the guilt of the appellant on that count would be a matter of assessment for the jury having heard her evidence. The offence occurred on 19 December 2012. The appellant was arraigned and pleaded guilty on 7 June 2013 to all the offences *except* the sexual assault by penetration. The trial had been fixed originally for 8 January 2014 but for some reason it did not proceed on that date. It was not until 7 March 2014 that the appellant was re-arraigned and pleaded guilty to count 1. Therefore for a very considerable period of time the victim believed that she would be required to give evidence. Thus the very late plea one week before the rescheduled trial substantially diminishes the credit which would otherwise be due to him.

[19] The Victim Impact Report prepared by Dr Paterson, Consultant Clinical Psychologist records his professional opinion that V is suffering from *Post Traumatic Stress Disorder* (PTSD), a debilitating condition which has a marked effect on one's psychological and social functioning. This report (dated 22 March 2014) was furnished to the defence by fax on 3 April 2014 8 days before the plea and sentence. It is a matter of concern that this report was prepared without reference to any independent evidence and, in particular, without reference to the injured party's medical notes and/or GP records. This is especially so where, as here, it would seem that the victim has a history of psychological problems. These are important documents which must be evaluated if a proper, accurate and reliable assessment is to be made. It thus follows that Dr Patterson's opinion is arrived at wholly or mainly on the basis of the injured party's uncorroborated history of her reaction to these events. This is quite unsatisfactory and very significantly reduces the weight that can be attached to a report that has been prepared without recourse to crucially relevant and readily available records. The defence in practice generally have little meaningful opportunity to challenge the contents of such reports and are ordinarily unlikely to request their own assessment of the victim provided the report has been properly prepared with reference to relevant independent records. This consideration merely serves to reinforce the point that as a matter of fairness and professional obligation such reports must be assiduously prepared with reference to relevant records.

Conclusion

[20] The seriousness of the offence of sexual assault by penetration is underlined by the consideration that it attracts a maximum penalty of life imprisonment. In the present case it involved a major violation of the victim's autonomy, sexual and otherwise. The offending was done to degrade the victim and it took place in the victim's home. The aggravating features of this offence are:

(i) The fact that the offence was committed in the victim's own home.

(ii) The gratuitous violence beyond that inherent in the sexual assault by penetration. Whilst this violence was used after the penetration it was an integral part of the overall event and immediately followed his checking of her bed for signs of intercourse.

(iii) The additional degradation and humiliation heaped on the victim by the appellant running his finger along the victim's upper lip after digitally penetrating her and by checking her bed to see whether she had intercourse with her male friend.

(iv) The steps taken by the appellant to prevent the victim from reporting the incident or obtaining assistance by smashing the house phone.

We are satisfied that the victim suffered psychological harm. However, had the opinion of Dr Patterson been reliably established that would have constituted a significant aggravating factor. The mitigating features are the relative brevity of the digital penetration, the absence of a relevant record, his (late) plea and remorse, which we accept as genuine.

[21] As Hutton LCJ observed in AG's Reference No 1 of 1991 [1991] NI 218 [at p.224G/H] "whether the sentences are concurrent or consecutive, the over-riding and important consideration is that the global sentence should be just and appropriate". We are in agreement with the Trial Judge that the violent physical assault that followed the initial sexual assault merited a significant increase on the starting point for the sexual offence. In the light of the mitigating factors, including his prompt admissions to police and his own history of illness a more lenient course could have been taken by a sentencing judge but the serious aggravating features in this case identified above are such that we cannot conclude that the total global sentence of 18 months' custody and 18 months' licence is either manifestly excessive or wrong in principle and we refuse the appeal.